Supreme Court, U.S.
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No. 97-151

In The

# Supreme Court of the United States

October Term, 1997

KEVIN CHRISTIAN, *et al.*,

*Petitioners,*

v.

CITY OF GLADSTONE, MISSOURI,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals**

## RESPONDENT'S BRIEF IN OPPOSITION

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## THE QUESTIONS PRESENTED

1. The first question presented for review by Petitioners does not describe an issue in controversy here or in any other reported case. No one would disagree but that the nature and character of an employee's activities must be examined to determine their status under Section 207(k). These cases are necessarily and always fact specific since municipalities organize, train and assign their public safety employees differently from one another depending upon the particular circumstances of their communities. In this case, the intertwined fire and paramedic responsibilities for the plaintiffs were fully considered by the court below in making its exemption decision. The cases relied upon by Petitioners are factually inapposite as they all involved factual situations where the paramedics at issue were not trained as firefighters or were not functionally integrated in the fire department or were never assigned as first responding firefighters. The facts make a difference and no court has held otherwise.

2. The second question for which review is sought is not clear. There is no dispute but that the plaintiffs here were regularly dispatched to fires and were an integral part of the City's fire protection activities. The parties stipulated that two of the five firefighters on duty during every shift were cross-trained as paramedics and that they responded to every significant fire emergency call received by the City.

There was a dispute below, and there has been some disagreement among the lower courts, as to where to

## THE QUESTIONS PRESENTED – Continued

draw the line factually in distinguishing exempt from nonexempt work for purposes of the "80/20" rule set forth by the Secretary of Labor at 29 C.F.R. § 553.212, which provides:

> Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. . . . The performance of such nonexempt work will not defeat [the Section 7(k) exemption] unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period.

The regulations do not define what constitutes "nonexempt work," let alone "nonexempt work which is not performed as an incident to or in conjunction with their fire protection activities." The only indication of what was intended is the following example of nonexempt work from the regulation:

> For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties.

As recognized by the District Court here "the distinction between exempt and nonexempt activities, although crucial for purposes of § 7(k), has not been explored with any specificity." (October 10, 1995 Memorandum and Order, p. 8). Petitioners are asking this Court to rewrite or

## THE QUESTIONS PRESENTED – Continued

clarify the regulations or to add definitions where they are silent.

## RESPONDENT'S BRIEF IN OPPOSITION

Section 207(k) of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, allows for the employees of municipalities who are engaged in fire protection activities to be employed for up to 212 hours in a 28-day work period without being paid at an overtime rate. This provision permits regular work schedules of 24 hours on duty followed by 48 hours off duty without overtime being required for those hours in excess of 40 in a particular 7-day workweek. The case at hand involves the application of the Section 207(k) exemption to firefighters of the City of Gladstone who are cross-trained as paramedics and who perform combined firefighter/paramedic duties as part of the City's functionally integrated Public Safety Department.[1] The Eighth Circuit held that the City's firefighter/paramedics were properly included within the ambit of the Section 207(k) exemption.

## REASONS FOR DENYING THE PETITION

1. Petitioners have not accurately described the facts presented by this case. For example, Petitioners claim they "spent virtually all their time in activities

[1] The firefighter/paramedics here were also cross-trained as police officers and sometimes were assigned to work in the law enforcement division for 28-day work periods. Under Section 207(k), employees assigned such law enforcement activities must be paid overtime for hours in excess of 171 during the period. Plaintiffs' law enforcement work is not an issue in the case.

related to providing purely emergency medical services. . . . " (Petitioners' Brief, p. 5). To the contrary, the parties stipulated that, on average, for each 24-hour shift, plaintiffs spent more than 13 hours eating, sleeping and relaxing while standing available for emergency calls; 2 hours in direct fire prevention activities other than waiting for or responding to fire calls; and approximately 3.5 hours on activities that were useful both for fire prevention and medical emergency purposes. Therefore, although a majority of their calls for emergency service were for medical problems rather than firefighting, only a small portion of their workday was taken up by either category of such calls.

2. Petitioners misstate the holding of the Eighth Circuit. That court *did not* find, as claimed by Petitioners, "that public employee paramedics can be treated as firefighters when the paramedics are not regularly dispatched to fires, are not an integral part of the fire protection activities and spend more than 20% of their time in activities that do not qualify for the exemption." (Petitioners' Brief, p. 8). In the case at hand, it was stipulated that the firefighter/paramedic group (1) constitutes 40% of the on-duty firefighting capability of the City at any given time and (2) are the first responding firefighters to any regular or general alarm in the City. (Stipulation of Facts, paras. 9, 11 and 8). In short, there was no question below but that plaintiffs *were* regularly dispatched to fire scenes and *were* an integral part of the City's fire protection activities.

3. Petitioners also claim that the Eighth Circuit "incorrectly found that a purely emergency medical call made by a paramedic for such things as an intestinal flu

complaint, a complaint of chest pain or a similar illness to be exempt even though such work has absolutely no relationship to a fire protection activity." (Petitioners' Brief, pp. 8-9). Petitioners cite no part of the Eighth Circuit's opinion as supporting this claim as to the court's finding; as, indeed it appears nowhere in the opinion.

4. There is no substance to Petitioners' claim that "as a consequence of this decision, the thousands of paramedics throughout the Eighth Circuit will be treated in an inferior manner to . . . other paramedics throughout the country." (Petitioners' Brief, p. 9). The case at hand has no application to paramedics generally. It applies only to individuals who are cross-trained both as firefighters and paramedics and who constitute an integral part of a municipality's fire protection activities. There is no other reported case dealing with the exemption status of a combination firefighter/paramedic so there is no basis for asserting that similarly-situated employees will be treated differently if the ruling is left to stand. Indeed, there is no conflict as Petitioners allege.

5. The City of Gladstone's operation of its Public Safety Department is significantly different from that of the employers in the cases cited by Petitioners as being in conflict with the Eighth Circuit's holding. In particular, as previously stated, the employees here are fully trained firefighters who regularly respond to fire calls as firefighters. In none of the cases cited by plaintiff as presenting a "conflicting" holding were the employees there at issue trained and utilized as "first responder" firefighters. As such, there is no basis for asserting that the Eighth Circuit holding is in conflict with any other holding nor does the

case present a suitable vehicle to address questions dealing generally with the inclusion of paramedic groups under the ambit of Section 207(k). There is no reason to believe other circuits, when presented with similar facts, would reach a different result.

6. The Department of Labor's regulations dealing with the inclusion of paramedic groups within the ambit of Section 207(k) are less than models for clarity and have caused confusion in the lower courts when applied to paramedics who are not trained or deployed as firefighters. But the regulations were not challenged below and it should not be this Court's function to rewrite the regulations or to otherwise pass on their validity in the posture of this case.

## CONCLUSION

Respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

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